In the Supreme Court of the United States

October Term, 1959.

No. 43

WILLIAM R. FORMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S PETITION FOR RE-HEARING

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel,
Public Service Building,
Portland, Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-60

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner hereby respectfully petitions for a re-hearing of the above entitled cause, decided February 23, 1960, on the following grounds:

I

The Court erred in holding that

"Petitioner concedes that this (remand for a new trial) would have been appropriate if such action

had been taken by the Court of Appeals upon original submission."

The record establishes that Petitioner did not make such concession. On the contrary, he contended that the Court of Appeals could not lawfully remand for a new trial, either on the original submission or on the alleged petition for re-hearing. Petitioner's Reply Brief, page 34, states:

> ". . . the Court of Appeals had no power to direct a a new trial, *either in its Original Opinion, or on the alleged petition for re-hearing* which was, in legal effect, an original proceeding for a new trial."

Upon oral argument, Petitioner's Counsel made the same contention.

Petitioner's basic contention was, throughout, that Petitioner was entitled to the entry of a judgment of acquittal in the District Court on his motion, made at the close of the entire case, and upon renewal of the motion, after the verdict was rendered, because the evidence was insufficient for submission of the case to the Jury and when the Court of Appeals decided, on original submission, that the case should not have been submitted to the Jury, the *only direction it could lawfully make and did make* was the entry of a judgment of acquittal. It directed the District Court to do what it should have done in the first place (*Sapir case*).

The argument made in Petitioner's Briefs and in the oral argument, insofar as it was based on the action taken by the Court of Appeals on the alleged petition for re-hearing, was *an added reason* why the Modification Opinion should be vacated. Petitioner contended that

under the so-called petition for re-hearing, the Court of Appeals had *no more power* to remand for a new trial *than it had upon the original submission.*

Petitioner did not contend, in brief or oral argument, that the Court of Appeals had no power to entertain a (true) petition for re-hearing and to revise its conclusion if it determined that it had erred. This was conceded (Reply Brief, 33). It was only contended:

(a) that the Court of Appeals did not err in directing judgment of acquittal for lack of evidence; and

(b) the Government's petition was not, in legal effect, for "re-hearing," but was, in effect, an original proceeding for a new trial based on alleged error of the District Court which was not raised in any manner in the District Court or in the Court of Appeals on the original submission.

The alleged error on which it sought direction of a new trial was the submission to the Jury of the "subsidiary conspiracy" theory (not objected to) and failure to instruct on the "continuing conspiracy" theory (Not requested). This alleged error was not presented to or passed upon by the Court of Appeals on the original submission. The government's sole contention was that there was evidence in the record to support the verdict *under the instructions as given.*

It was, and is, Petitioner's contention that the Court of Appeals, being a Court of review only, cannot entertain any proceeding, however it may be labeled, to determine an issue not raised in the District Court or in the Court of Appeals, on the original submission.

When the Court of Appeals was asked to direct a new trial, after decision on the original submission, it was not called on to re-consider an issue theretofore submitted and passed upon, but was asked to try the issue de novo.

The Government did not, on the renewal of the motion for acquittal in the District Court or on the original submission in the Court of Appeals, confess error and seek a new trial.

The petition for a new trial, under these circumstances, *did not invoke appellate jurisdiction.* It called for the exercise of original jurisdiction which the Court of Appeals did not have.

In the District Court, Petitioner contended that prosecution was barred by the Statute of Limitations unless there was, in fact and in law, a subsidiary conspiracy that would toll the operation of the Statute of Limitations and that there was no evidence of such a subsidiary conspiracy.

The District Court denied the motion for acquittal because, in its opinion, there was evidence from which the Jury could find the existence of a "subsidiary conspiracy."

Petitioner had the right to have the issue of the existence of the subsidiary conspiracy submitted to the Jury after the Court ruled that there was evidence thereof in the record. *Petitioner had the right to have his theory of the case submitted to the Jury,* without waiving the contention that there was no evidence. (Rule 29b, Federal Rules of Criminal Procedure).

In submitting that issue, the District Court stated the correct principles of law. The instruction, as given, was clearly in accordance with the decision of the Court of Appeals for the Second Circuit in the *Grunewald case* and was in accordance with the decision of this Court on the subsidiary aspect of the case. *So far as the subsidiary conspiracy was concerned, this Court affirmed the Court of Appeals of the Second Circuit in every respect.*

There was no error in the giving of that instruction so far as the principles of law were concerned if there was, in fact, evidence to sustain the premise that there was a subsidiary conspiracy. If as the court believed there was evidence, it was compelled to submit the issue.

No contention up to that point was made that the case might have been, or should have been submitted on an alternative "continuing conspiracy" theory.

When the appeal was taken and the Government wrote its brief, this Court had already decided the *Grunewald case,* yet it did not make any contention that the instructions, as given, were erroneous. It contended only that there was evidence sufficient to sustain the verdict under the instructions as given.

In its brief, in the Court of Appeals, it did not contend that the case could have, and should have, been submitted on a continuing conspiracy theory. The Government said, in its brief in the Court of Appeals, page 57:

> "The court met the requirements *set forth by the United States Supreme Court in Grunewald v. United States* . . . The instructions were lengthy and complete, and those pertaining particularly to

the question of continuing conspiracy are set out in full in the Appendix, beginning p. 2a."

The instructions, quoted at that point, are the instructions concerning the existence of the subsidiary conspiracy which it now claims were erroneous.

This left, for decision by the Court of Appeals, the sole question whether the evidence was sufficient to sustain the verdict under the instructions as given and it determined that the evidence was not sufficient.

The Court of Appeals, in view of the limited issue, did not consider or pass upon the question whether the case could have been, or should have been, submitted on a "continuing conspiracy" theory. That was not an issue in the case in the Court of Appeals on the original submission and was not determined.

The Court of Appeals did not, in modification opinion, decide that it erred in determining that the evidence was insufficient under the instructions as given.

Consequently, when the Government petitioned for a modification of the decision to remand for a new trial on the ground that the case "might" have been submitted on the alternative continuing conspiracy" theory, it *presented a new issue* to the Court of Appeals. It did not ask the Court of Appeals to re-consider any conclusion or decision theretofore made by it in that respect for the issue was not before it and it expressed no opinion thereon and, indeed, could not have done so even if it had been presented because the issue had not been presented in the District Court.

For these reasons, the document filed by the Government, although denominated "Petition for Re-Hearing," was, in legal effect, an original petition for a new trial in the Court of Appeals so that the case could be tried on a new theory.

We respectfully submit that the Court over-looked this basic contention when considering the power of the Court of Appeals on a true petition for re-hearing.

A true petition for re-hearing presents, for re-consideration, the issues formerly presented and considered or presented and overlooked. It does not present issues which were never raised, considered or passed upon. This Court, as have all Appellate Courts, has stated that new issues cannot be considered when presented, for the first time, by petition for re-hearing. (*Independent Wireless Tel. Co. v. Radio Corp. of America,* 270 U.S. 84; *U. S. v. Achilli,* 234 F.2d 797 (7th Cir.), aff'd 353 U.S. 373. When a new issue is presented, the Court is not called upon to review or reconsider any prior determination and although labeled a petition for "re-hearing," it is not such in legal effect. It invokes original jurisdiction.

II

The Court erred in construing Section 2106, Title 28, U.S.C.A., as conferring power to direct a new trial in *criminal cases* in which a judgment has been *reversed for want of evidence warranting submission of a case to the Jury.*

The precise question has never been decided by this

Court or any Court of Appeals except in the *Karn case* in the Ninth Circuit.

The question was never squarely presented in this Court until the *Sapir case,* but the Court did not expressly pass on the question. It was, however, discussed by Justice Douglas in his Concurring Opinion and we believe that his views, therein expressed, support Petitioner's contention when properly understood.

In a number of cases, cited in the *Bryan case,* some Courts, on reversal, remanded for a new trial under varying conditions. Other Courts, including this Court, directed acquittal. In none of these cases reversed for lack of evidence was the *power* to remand for a new trial challenged, raised, discussed or passed upon. Consequently, these cases are not authority either way on the precise issue.

There are some cases in which the *propriety* of remanding for a new trial was passed upon, but none in which the *power* to do so in a *criminal case when the reversal was for lack of evidence* was passed upon.

No case has considered or passed upon the impact of the double jeopardy clause of the Fifth Amendment on the construction of Section 2106 in criminal cases.

In the case at bar, this Court held, in effect, that the Court of Appeals could, in its discretion, remand for a new trial under Section 2106, but it did not pass upon or decide the power of the Court of Appeals to do so in criminal cases in view of the constitutional guaranty against double jeopardy.

The precise question is, if the District Court erroneously denies a defendant a judgment of acquittal and the Court of Appeals reverses the conviction for lack of evidence, can the Court of Appeals remand for a new trial? Does such remand subject defendant to double jeopardy?

Petitioner contends that when the reversal is for lack of evidence (as distinguished from errors infecting the trial) direction of acquittal is mandatory. The mandate must direct the District Court to enter the judgment that it should have entered in the first place. But, if instead, it directs a new trial, it subjects the defendant to double jeopardy.

In the *Sapir case,* Justice Douglas said:

> "The granting of a new trial after a judgment of acquittal for *lack of evidence* violates the command of the Fifth Amendment that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'
>
> * * * * *
>
> "But an acquittal on the basis of lack of evidence concludes the controversy, as the *Kepner case* holds, and puts it at rest under the protection of the Double Jeopardy Clause, absent a motion by the defendant for a new trial."

Justice Douglas also pointed out the distinction between a reversal for lack of evidence and a reversal on grounds of error that infected the trial and cites the *Palko case,* 302 U.S. 319, in support thereof.

The Court did not pass upon the precise question, to-wit: the impact of the double jeopardy clause of the Fifth Amendment on the construction of Section 2106 when applied to a reversal for lack of evidence in *criminal cases.*

We submit that if Section 2106 is construed as granting discretionary power to remand for a new trial in a criminal case, when the reversal is for lack of evidence, it contravenes the Constitution and is void because it subjects him to another trial when he should have been acquitted.

The Constitution does not leave it to the discretion of any Court whether the guaranty against double jeopardy should be afforded to a defendant. To say that a Court can exercise discretion to grant or withhold the protection against double jeopardy, is to amend, in effect, the Fifth Amendement. The constitutional provision is mandatory and under it, if a defendant becomes entitled to a judgment of acquittal, as a matter of law, no Court should be permitted to deny that protection in the exercise of discretion.

Section 2106 was not designed to determine under what circumstances or conditions any one of the enumerated dispositions is to be made. It is merely a catalog of the powers which the Appellate Court may exercise. But the exercise of the powers depends upon the conditions existing in each case and is *subject* to *constitutional limitations.*

III

The Court erred in holding that it has been heretofore established that the taking of an appeal by the defendant in a criminal case, constitutes, *under all circumstances,* a waiver of his right to the constitutional protection against double jeopardy and that the Appel-

late Court may direct a new trial in a case where the reversal is based upon the lack of evidence.

No case heretofore decided by this Court has so held. The cases of *United States v. Ball* and *Green v. United States* did not pass upon or decide this issue. *Neither of the two cases involved a reversal on the ground of the insufficiency of the evidence to sustain the conviction on the instructions as given.*

In the *Ball case,* the Government did not move for a new trial as in the case at bar. The Supreme Court sustained the defense of double jeopardy as to the defendant Millard F. Ball and in that connection, this Court quoted with approval from the Dissenting Opinion of Justice Livingston in the "leading case", of *People v. Barrett,* 1 Johnson 66 (N.Y.), as follows:

> " 'This case, in short, presents the novel and unheard-of spectacle of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming, too, from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law that no man shall be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end?"

This observation is applicable to the situation in the case at bar because here, too, the Government, through its representatives, its Attorneys, concedes that it acqui-

esced in the submission of the case to the Jury on the instructions as given *without objection* and omitted to seek submission of the case to the Jury on the alleged "continuing conspiracy" theory. It did not assign this omission as error in its brief in the first submission to the Court of Appeals although this Court had already decided the *Grunewald case. The Government now asserts that it erred in this acquiescence and now seeks a new trial because of its own failure to have the case submitted in the Trial Court upon the theory which it deems to be correct.* Here, too, the Government seeks a new trial by reason of its "own inaccuracy or neglect." In principle, there is no difference between the errors and omissions of the Government's Counsel in this case and the inaccuracy or neglect in the drawing of the indictment in the *Ball case*.

As to the remaining two defendants in the *Ball case*, to-wit, John C. Ball and Robert E. Boutwell, the Court rejected the defense of double jeopardy because the reversal was based on the insufficiency of the indictment. The question of the effect of a reversal for *lack of evidence* was not involved, discussed or passed upon by the Court.

There is no language in the *Ball case* which either directly or indirectly warrants a conclusion that the taking of an appeal by a defendant in a criminal case operates as a waiver of his constitutional protection against double jeopardy under all circumstances and, particularly, when the reversal is based on the *lack of evidence*.

There is a vast and fundamental difference between a reversal based on a defective indictment and a reversal based on lack of evidence. (Justice Douglas in the *Sapir* case.) A reversal on the former ground does not carry with it any implication as to the guilt or innocence of the defendant. It involves merely the question of whether the defendant should have been tried at all because of the insufficiency of the indictment.

On the other hand, a reversal for want of evidence implies, as a matter of law, that although the defendant was tried on a valid indictment and was subjected to a legal trial, he was, as a matter of law, entitled to judgment of acquittal at the conclusion of the entire case. The reversal for want of evidence establishes that the District Court should not have submitted the case to the Jury and that it should have acquitted the defendant. The implications of a reversal for lack of evidence, make it impossible to classify it in the same category as a reversal for errors committed during the trial in the admission or rejection of evidence, or in the giving of erroneous instructions over objections duly taken, or for defective indictment. The consequences of a reversal for lack of evidence make applicable the double jeopardy clause of the Fifth Amendment.

The *Green case* did not involve the question whether the defendant could be retried after a reversal. The case involved only the question whether he could be tried for first degree murder after the implied acquittal for first degree murder and the reversal of conviction for second degree murder. The question whether he could be re-

tried for second degree murder was not raised, discussed or passed upon by the Court. Insofar as the Court discussed generally the subject of double jeopardy, we believe that it sustains Petitioner's contention in this case. The Court held that

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the *hazards of trial and possible conviction* more than once for an alleged offense. . . . .
>
> "Thus it is one of the elemental principles of our criminal law that the *Government cannot secure a new trial* by means of an appeal even though an acquittal may appear erroneous." (Citing the *Ball* case among others). (Emphasis supplied)

The statement in the *Green* case that

> "this Court has also held that a defendant can be tried a second time for an offense when his prior conviction for that same offense had been set aside on appeal."

citing *Ball*, was dicta and was too broad. It is not supported by the *Ball case* as we have heretofore demonstrated.

In *Green*, the Court rejected the theory that an appeal was, itself, a "waiver: of the constitutional defense of former jeopardy. The Court held that waiver

> "connotes some kind of voluntary knowing relinquishment of a right."

The Court adopted Justice Holmes' observation made in the *Kepner case* that

> " 'Usually no such waiver is expressed or thought of. (In taking an appeal from a conviction). Moreover, it cannot be imagined that the law would

> deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.'"

The Court also held "untenable" that an appeal "prolonged his original jeopardy."

The rejection by this Court of the "waiver theory" and the "prolongation of original jeopardy theory," negatives and repels the contention that the taking of an appeal, in all cases and upon all grounds in and of itself, precludes the application of the double jeopardy defense. The true rule must, therefore, be that reversal on the ground of *lack of evidence* makes mandatory the direction of a judgment of acquittal and that a new trial would only be warranted where the reversal is on grounds which, in effect, nullify the trial or, as has been said, infects the validity of the trial.

The *Green case* limits the application of the *Ball case* and supports Petitioner's view that the direction for a new trial, under the circumstances of this case, subjects Petitioner to double jeopardy.

In *Bryan v. United States*, 338 U.S. 552, the Court first considered the question of the *propriety* of remanding with direction for a new trial under Section 2106. That portion of the Opinion did not discuss the impact of the constitutional guaranty against double jeopardy on the construction to be placed on Section 2106 when applied to criminal cases.

The Court cataloged a number of cases in which, under varying circumstances, Courts had remanded

for a new trial and, in others, remanded for the entry of a judgment of acquittal, but in none of them was the question of the impact of the double jeopardy clause of the Fifth Amendment on the construction of Section 2106 raised, discussed or passed upon except in the *Karn case* in the Ninth Circuit.

The Court then considered the question of double jeopardy as applied to a case in which the *defendant requested a new trial* if reversal was based upon insufficiency of the evidence as an alternative to judgment of acquittal.

In that case, it was not the Government who petitioned for a new trial. It was the defendant's alternative request for a new trial which was deemed, in effect, a waiver of the guaranty against double jeopardy.

In the case at bar, the Government petitioned for a new trial and not the defendant. The defendant did not, in connection with his motion for judgment of acquittal in the District Court or in the Court of Appeals, seek a new trial.

In the *Karn case,* 158 F. 2d 568 (9th Cir.) (the only case cited in *Bryan* in which the constitutional question was considered, the Court held:

> "The right of appellant to a verdict of acquittal fully matured when he made his motion. To remand the case with directions to grant new trial would, in our judgment, be a serious invasion of the rights which accrued to him in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind."

The language used by the Court in the *Bryan case*

must be read in connection with and as *relating to the defendant's alternative request for a new trial* upon reversal for lack of evidence.

In the *Kepner case,* the Court was concerned with the validity of a statute giving the Government *the right to appeal in a criminal case* and this Court held that the statute was void because it contravened the constitutional guaranty against double jeopardy. This principle is applicable to Section 2106 if it is construed to authorize the Appellate Court, in its discretion, to remand for a new trial upon reversal for lack of evidence *in a criminal case.*

If a statute, granting the Government the right to appeal in a criminal case contravenes the guaranty against double jeopardy, a statute granting an Appellate Court discretion to grant a new trial in a criminal case when the defendant was, as a matter of law, entitled to a judgment of acquittal, likewise, contravenes the guaranty against double jeopardy and that is *especially true where the Government seeks the new trial* and not the defendant.

Upon the principle applied in *Kepner,* Section 2106 must be construed as precluding the right of an Appellate Court to exercise discretion to remand for a new trial when the reversal is predicated on the ground of lack of evidence.

IV

The Court over-looked the basic proposition that in a criminal case the Government is precluded from asserting error and seeking a new trial by reason thereof.

In the case at bar, it is the Government that asserted error in the instructions and petitioned for a new trial in the Appellate Court based thereon.

Assuming, without admitting, that the instruction, complained of by the Government, is erroneous, it is immaterial so far as the constitutional question is concerned whether the instruction was given by the Court on its own initiative or requested by the defendant. The only relevant question is, can the Government assert the error and seek a new trial by reason thereof?

In *Palko v. State of Connecticut*, 302 U.S. 319, Justice Cardozo said:

> "It (5th Amendment) forbade jeopardy in the same case if the new trial was *at the instance of the government* and not upon defendant's motion." (Emphasis supplied)

In the *Kepner case*, 195 U.S. 100, the Court quoted with approval from the Opinion in the case of *People v. Webb*, 38 Cal 467, as follows:

> "We are entirely satisfied that this court has no authority in criminal cases, under our state Constitution, to order a new trial of a defendant at the instance of the prosecution for mere errors in the ruling of the court during the progress of the trial after the jury have been charged with the case, and have rendered a verdict of not guilty. No case has been called to our attention, and after a most diligent examination of authorities, we have not been able to find a single American case where a retrial has been ordered or sanctioned by an appellate court at the *instance of the prosecution*, after the defendant had been once put upon his trial for an alleged felony, upon a valid indictment before a competent court and jury, and acquitted by the verdict of such jury; but we find a vast number

> of adjudications of the highest judicial tribunals of the different states and many of the Federal courts to the effect that no such retrial is authorized by the common law, and is directly interdicted by the Constitution of the United States and also of most of the several states."

The Federal Rules of Criminal Procedure do not permit the Government to assert error and seek a new trial under any condition and it is denied the right of appeal.

If, upon the renewal of the motion for acquittal, after the verdict was rendered, the Trial Court had sustained the motion and entered judgment of acquittal, the Government could not have appealed from that judgment, whether the decision was right or wrong. The result is the same when the Court of Appeals reverses a criminal case for lack of evidence (*Sapir case*). There is no apparent reason in principle why the Government should be permitted to petition for a new trial based on alleged errors after the determination that judgment of acquittal should have been entered in the Court below.

If there was any error in the instructions, it was the failure to instruct the Jury to determine whether there was a "continuing conspiracy" to evade by making false statements and submitting false financial statements and records as distinguished from the "subsidiary conspiracy" instruction which was given. *The failure to give that instruction is attributable to the Government.* If it deemed such an instruction within the purview of the evidence and indictment, it should have requested such an instruction. Had such a request been made by the

Government, the Court would have submitted both theories with instructions that if the Jury found the "continuing conspiracy," as distinguished from the "subsidiary conspiracy," the statute of limitations would not run.

The petition for the new trial is predicated on the Government's own error.

The Government speculated on going to the Jury on the alleged "subsidiary conspiracy" theory by not objecting thereto and without requesting instruction on the "continuing conspiracy" theory. It sought to sustain the conviction on that theory in the District Court and in the Court of Appeals *even after the decision of this Court in Grunewald*. It was only after the Court of Appeals determined that Petitioner was entitled to acquittal on the theory embraced in the instructions, as given, that it asserted error, *acknowledged its own dereliction* and petitioned for a new trial contrary to the law as embodied in the rules, statutes and decisions precluding the Government from seeking a new trial.

V

The Court erred in holding that if the Petitioner had not injected the infected language (subsidiary conspiracy theory) into the charge, the Trial Court would have submitted the "continuing conspiracy" theory.

We submit that this is pure speculation. There is nothing in the record to indicate what instructions the Court would have given in the absence of the instruction on the "subsidiary conspiracy" theory.

On the contrary, it is quite evident from the record as a whole that the Trial Court would not of its own initiative have given a "continuing conspiracy" instruction. It is, of course, possible that the Trial Court may have given a "continuing conspiracy" instruction *if requested by the Government*. We are left to speculate what the Trial Court would have done had such an instruction been requested. It may be inferred that the Trial Court was disposed to submit to the Jury the theory of each of the parties so that the theory of the prosecution and defense could be presented to the Jury. But it cannot be said that the Court would have given the "continuing conspiracy" instruction in any event if Petitioner had not requested the "subsidiary conspiracy" instruction.

The Government now wants to be relieved from its failure to seek a conviction upon the "continuing conspiracy" theory in violation of the law precluding double jeopardy.

VI

Justice Harlan erred in his Concurring Opinion in the construction and application of Rule 30 of the Federal Rules of Criminal Procedure to the case at bar.

It has been repeatedly said by the Courts that the object of this Rule, like its counterpart Rule 51 of the Federal Rules of Civil Procedure, is

> "to reduce the possibility of error by giving the Trial Judge an adequate opportunity to correct any mistake in his charge, as well as to afford to the opposing party an opportunity to keep error out of

the records." (*Armstrong v. United States*, 228 F.2d 764).

Compliance with this Rule is especially important in criminal cases because of the Double Jeopardy Clause of the Fifth Amendment and it imposes a greater duty on the Government to avoid the submission of the case to the Jury on erroneous instructins given or omitted because of the possibility of subjecting a defendant to a second trial (double jeopardy) by reason thereof.

The Government petitioned for a new trial on the specific ground that it was error to submit the case to the Jury on the "subsidiary conspiracy" theory and that it was error to omit instruction on a "continuing conspiracy" theory.

Had the Government objected to the instruction, as given, and requested instruction on "continuing conspiracy," the Trial Court would have had an opportunity to change the instructions if convinced that the Government was right.

If there was error in the instructions in these respects, Rule 30 in express language precludes the Government from assigning the errors. For this purpose, it is immaterial whether the instructions, as given, were proposed by Petitioner or given by the Trial Court on its own initiative. The only relevant question is, were the instructions erroneous, and if they were, it was incumbent upon the Government to object and to request proper instructions. The Rule precludes the Government from complaining thereafter.

(a) Rule 30 precludes *all parties* from assigning error

unless the objection is made. This, of course, includes the Government.

(b) The Rule precludes assigning error *in the District Court*, as well as *in the Court of Appeals* in the absence of objection. Neither Court could entertain any contention based on the instructions and grant relief based thereon in the absence of objection and request for instructions.

(c) The Rule applies to instructions given and to instructions *omitted* ("or omission"). A party is precluded from complaining that the Court erred in not submitting instructions embodying a different theory unless he requested its submission and was refused. That is the only way one can object to an "omission."

(d) The requirement that the party must state "distinctly the matter to which he objects and the grounds of his objection," emphasizes the requirement.

It was within the power of the Government to avoid the possibility of double jeopardy—a new trial—by interposing the objections to the instructions, as given, and request instructions on "continuing conspiracy" theory. The Rule precludes the Government from assigning these errors and seeking a new trial based thereon.

Justice Harlan erroneously states that the Rule does not apply in this case because "it erred in the Government's favor."

If the instruction, as given, was erroneous and the failure to give a "continuing conspiracy" instruction was erroneous, the errors were adverse to the Government

and required appropriate objection and request in order to enable it to assign the errors and seek relief by reason thereof. The Government contends that the alleged errors were prejudicial to it. That is the basis of its petition for the new trial.

The Government believed that the instructions, as given, were correct. (Government's Petition for Re-Hearing in the Court of Appeals, page 6). It acquiesced in the theory submitted in Petitioner's requested instructions and did not object or request submission of instructions embodying the alleged "Continuing Conspiracy" theory. It was only after the Court of Appeals decided that there was no evidence to support the conviction on the theory of the instructions as given, that the Government concluded that the instructions were erroneous and that an "alternative theory" should have been submitted. It first said the instructions were proper and after being defeated, asserts that the instructions were erroneous and it wants a new trial on that ground.

Rule 30 (Federal Rules of Criminal Procedure) was designed to prevent just such a result in a criminal case. To relieve the Government from compliance with Rule 30 results in subjecting the defendant to the jeopardy of another trial. It gives the Government one or more opportunities to obtain a conviction so that if defeated on one theory, it can try him again on another theory.

The application of Rule 30 to the Government makes it mandatory for the Government to try the defendant on all available theories and to seek submission of the case to the Jury on correct instructions. This requires it to object to erroneous instructions and to request

proper instructions and its failure to do so in a criminal case is an acquiescence in the theory on which the case was submitted.

It is immaterial in a criminal case whether the Government's failure to object and request proper instructions was intentional and deliberate (conceded in this case) or was due to mistake in determining the proper theory for submission. The result is the same. Its failure to object and request instructions deemed proper, is made the basis of a petition for a new trial that will subject defendant to double jeopardy, a result which it could, and should have, avoided.

VII

Justice Harlan erred in stating that the *Sapir case* does not recognize the distinction between reversal on the ground of errors infecting the trial and reversal on the ground of lack of evidence.

Justice Douglas said, in the *Sapir case*:

> "a reversal by the appellate court on grounds of error that infected the trial would also be different," citing the *Palko case*, 320 U.S. 319.

CONCLUSION

Petitioner submits that if the decision rendered herein is allowed to stand, it will result in:

(a) a serious impairment of the protection against double jeopardy guaranteed by the Fifth Amendment because it subjects a defendant to the embarrassment, expense and ordeal of another trial when, at the conclusion of the trial, he was entitled to an acquittal as a matter of law;

(b) The construction placed by this Court on *Section 2106,* so far as it permits the Appellate Court to direct a new trial upon reversal for lack of evidence, results in an impairment of the constitutional guaranty against double jeopardy. In effect, it subjects a defendant to another trial because of the fortuitous circumstance that the Trial Court erroneously failed to enter judgment of acquittal;

(c) The decision results in a serious impairment of *Rule 30 of the Federal Rules of Criminal Procedure* which prohibits the Government, as well as the defendant, from assigning as error, at any time, the giving of an alleged erroneous instruction in the absence of objection and/or the failure to give instructions in the absence of request therefor;

(d) The decision will be construed as authorizing the Court of Appeals to consider and determine issues that were not presented, passed upon or determined in the District Court or in the Court of Appeals on original submission, thereby exercising original jurisdiction to try the new issue de novo instead of exercising the functions of a Court of Review.

Petitioner submits that the Court should re-examine the case with these consequences in view and that it

will, upon such re-examination, conclude that the original Opinion of the Court of Appeals reversing the conviction with direction for the entry of a judgment of acquittal, was correct, should be reinstated and the Modification Opinion vacated.

Respectfully submitted,

SOLOMON J. BISCHOFF,
Counsel for Petitioner,
Cascade Building,
Portland, Oregon.

GEORGE W. MEAD,
Of Counsel
Public Service Building,
Portland, Oregon.

CERTIFICATE OF GOOD FAITH

I, SOLOMON J. BISCHOFF, Counsel for Petitioner, certify that this Petition for Re-Hearing is presented in good faith; that it is not interposed for delay and that in my judgment it is well founded.

Dated MARCH 10th, 1960.

SOLOMON J. BISCHOFF,
Counsel for Petitioner.